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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1362

MILFORD R. WADDELL,
Petitioner,

vs.

DONALD E. FLEMING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Milford R. Waddell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on January 29, 1975, affirming the judgment against him in the United States District Court for the District of Kansas.

There are two questions in this case:

1. Does the definition of insolvency in Section 1(19) of the Bankruptcy Act include exempt property among the assets of the bankrupt?

2. Does Section 67 of the Bankruptcy Act set aside liens obtained by judgment within four months of Bankruptcy, even though under the Kansas law the lien of a Kansas judgment relates back four months on real estate in the county?

The Court of Appeals relied solely on its decision of Question No. 1.

(a) OPINIONS BELOW

The Opinions and Judgments below in the Tenth Circuit Court of Appeals by Judge Holloway, and the District Court for the District of Kansas by Judge Templar, and the Bankruptcy Court by Judge Sullivant, are printed in the Appendix.

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) The opinion and judgment sought to be reviewed was entered January 29, 1975.

(2) This Petition for Certiorari is filed less than 90 days from the time aforesaid.

(3) The jurisdiction of this Court is invoked under Title 28, Section 1254 (1).

C.I.R. v. *Hansen*, 360 U.S. 446, 450, 79 S.Ct. 1270, 1273(1), 3 L.Ed.2d 360.

(c) QUESTIONS PRESENTED FOR REVIEW AND ARGUMENT

The first issue is the definition of insolvency under 11 U.S.C., Sec. 1(19), as follows:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of property . . . conveyed . . . to defraud . . . creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

The Court below took the view that "inclusio unius est exclusio alterius" means that the aggregate of his property shall include exempt property. It is respectfully submitted that this rule of interpretation does not here apply.

> "Maxim 'inclusio unius est exclusio alterius' is rule of interpretation and not a constitutional command."[1]
>
> "Maxim, 'Inclusio unius est exclusio alterius,' expresses rule of construction and serves only as aid in discovering legislative intent where such intent is not otherwise manifest."[2]
>
> "Under the maxim of 'Inclusio unius est exclusio alterius', where a statute enumerates and specifies the subjects or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, or, under a general clause, those not of like kind or classification as those enumerated."[3]

The rule is only one of many aids to help in the interpretation of laws. The primary rule is the Court should interpret laws to make sense.

Primarily, exempt property is not at all in the same class as property fraudulently conveyed. The decisions of the Courts below all assume this and this in truth is not the fact. The Judge in *In re Henry Armstrong*, 145 Fed. 202, stated, "In my opinion, the homestead should not be considered in the question of solvency or insolvency." It is up to this Court to settle this question in an equitable manner now.

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1. *State* v. *Driscoll*, 54 P.2d 571, 576, 101 Mont. 348.

2. *Garrison* v. *City of Shreveport*, 154 So. 622, 179 La. 605.

3. *State ex rel. Whall* v. *Saenger Theatres Corporation*, 200 So. 442, 446, 190 Miss. 301.

The second question is the interrelation between the Bankruptcy Law on setting aside certain acts during the four (4) months preceding bankruptcy and the Kansas Law making a judgment a lien on property in the County four (4) months prior to the entry of the judgment. It would appear that Kansas, by using the same four month period, is seeking to get around the Bankruptcy Law. This question has never been considered, including by the opinions of the Judges in the three Courts below.

It is a most interesting question but it has not been reached because this case has been decided on the first issue.

CONCLUSION

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Tenth Circuit, reversing and remanding this case with directions to that Court to set aside its opinion and judgment herein and to enter judgment in favor of Appellant on the issue of law.

JOHN M. CLEARY
Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned, John M. Cleary, counsel of record for Petitioner, hereby certifies that the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and is believed to be meritorius.

JOHN M. CLEARY

APPENDIX

OPINION

(Filed January 29, 1975)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 74-1135

In the Matter of
M. R. WADDELL,
Bankrupt-Appellant,

v.

DONALD E. FLEMING,
d/b/a GARDNER GRAIN CO.,
Respondent-Appellee.

Appeal from the United States District Court for the District of Kansas
(D. C. No. 8702-B-1)

John M. Cleary, Kansas City, Missouri (Charles E. Whitman, Lawrence, Kansas, on the brief) for Bankrupt-Appellant

Robert B. Oyler, Lawrence, Kansas (James E. Salyer, Lawrence, Kansas, on the brief) for Respondent-Appellee

Before HILL, SETH and HOLLOWAY, Circuit Judges

HOLLOWAY, Circuit Judge

This bankruptcy appeal presents the question whether a farm of a bankrupt which is exempt property as a homestead under Kansas law is to be included among his assets in determining whether he is insolvent within the meaning of § 67a of the Bankruptcy Act, 11 U.S.C.A. § 107a. The Bankruptcy Judge held the property is so included and the District Court agreed. ..... F. Supp. ..... We affirm.

Briefly the facts are as follows. Prior to July 22, 1971, appellee Fleming filed suit in the District Court of Douglas County, Kansas, against appellant Waddell to recover for sales of feed to Waddell from July, 1969, through December, 1970. On November 22, 1971, judgment was obtained by Fleming in the amount of $11,261.63, plus interest.

This judgment became a lien on the real estate—a 160 acre farm—owned by Waddell, under the provisions of K.S.A. § 60-2202. Execution was issued on the judgment and the land was to be sold by the sheriff of Douglas County, Kansas, on January 11, 1972. However on December 21, 1971, Waddell filed a voluntary petition in bankruptcy in the United States District Court for the District of Kansas, and thereafter obtained a stay of execution of the sale.

The bankruptcy schedules filed by Waddell listed secured creditors' claims totaling $22,000, priority claims in the amount of $400, and unsecured creditors' claims in the amount of $13,584. This latter sum included the $11,261 judgment of Fleming. The schedules listed assets consisting primarily of the farm, in which Waddell's interest was estimated at $100,000. In addition, some items of personal property were listed, including an automobile and household goods valued at $1,180. In the summary of

debts and assets in Waddell's schedules, total debts listed were $35,984, and total assets listed were $101,211.

However, Waddell claimed all of his assets as exempt property, the farm being claimed as a homestead.[1] Following a contested hearing on December 1, 1972, the farm was found to qualify as a homestead and was set off as exempt, together with other items of personal property, on December 8, 1972.

On January 9, 1973, Waddell filed an application under § 67a of the Bankruptcy Act seeking to have the lien of the judgment in favor of Fleming declared null and void on the ground that it was obtained within four months before the filing of the petition in bankruptcy at a time when Waddell was insolvent as defined in § 1(19) of the Bankruptcy Act, 11 U.S.C.A. § 1(19).

It was stipulated that Waddell's financial condition was substantially the same on the date the judgment in favor of Fleming was rendered as it was at the time Waddell filed his petition in bankruptcy. (R. 46, 48). Thus it is apparent, and was further stipulated (R. 46), that whether Waddell was insolvent when Fleming's lien was obtained turns on whether his exempt property, in particular his equity in the homestead, is considered as an asset for the purpose of determining insolvency with respect to the application to avoid the judgment lien under § 67a.

Appellant Waddell contended that, in determining the issue of insolvency, one must first deduct from the aggregate of the bankrupt's property all of his exemptions. As stated, the Bankruptcy Judge rejected this contention and went on to hold that Waddell had failed to

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1. In the summary of debts and assets in Waddell's schedules (R. 15), the exemptions claimed were $101,211—the total of his property. However, in schedule B-5 (R. 13), where exemptions are claimed, the total value claimed was $100,200.

sustain the burden of proving that he was insolvent at any time within the four-month period preceding the filing of his petition in bankruptcy. (R. 26-28). He found that Waddell was not insolvent within the meaning of the Bankruptcy Act when Fleming's judgment lien was obtained or at any time within the four-month period preceding the filing of his bankruptcy petition. (R. 22). The views of the Bankruptcy Judge were sustained by the District Court (R. 48-50), and this appeal followed.

Section 67a of the Bankruptcy Act provides, in relevant part, as follows:

> Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . .

Under the statute the insolvency of the bankrupt is a condition precedent to the voiding of a lien. As the person seeking the benefit of § 67a to avoid the lien, the burden was on Waddell to establish his insolvency at the time the lien was obtained. See 4 Collier on Bankruptcy, ¶67.05 at 99-100 (14th ed. 1971).

On this appeal, appellant Waddell first contends that Fleming, having been a party to the adjudication of bankruptcy, is now estopped to deny that Waddell was insolvent on the date of the judgment creating the lien. He advances the following syllogism in support of this argument: (1) the adjudication of bankruptcy establishes that he, Waddell, was insolvent on that date, and this determination is now both res judicata and the law of the case; (2) it is stipulated that his financial condition was sub-

stantially the same on the date the judgment creating the lien was rendered as it was at the time of the filing of the petition in bankruptcy (R. 46); and (3) therefore, he must have been equally as insolvent at the time Fleming obtained his judgment lien as at the time he was adjudicated bankrupt.

We reject this contention because the conclusion drawn is not sound. It does not necessarily follow that, because Waddell's financial condition was substantially the same on the date of the state court judgment as it was on the date he filed for bankruptcy, the adjudication of bankruptcy determines his insolvency for purposes of § 67a on the former date. Bankruptcy and insolvency for purposes of § 67a are two different legal conclusions and facts supporting one do not necessarily support the other. The question of Waddell's insolvency on the date the judgment lien was obtained, for purposes of § 67a, was not at issue and was in no way determined by the adjudication of his bankruptcy. See Liberty National Bank v. Bear, 265 U.S. 365, 370; 4 Collier on Bankruptcy, ¶67.05 at 99-100 (14th ed. 1971). Certainly the Bankruptcy Judge who adjudicated Waddell bankrupt did not believe that adjudication determined the issue of Waddell's insolvency for purposes of § 67a, for he also found that Waddell was not insolvent when Fleming's judgment was obtained.

Since we cannot accept appellant Waddell's argument that the issue of his insolvency is settled by an estoppel or res judicata or the law of the case, we will examine the merits of that issue directly.

The definition of insolvency provided in § 1(19) of the Bankruptcy Act is controlling here with respect to insolvency for purposes of § 67a. That definition is as follows:

> A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.

This definition expressly excludes from the aggregate of a person's property only such fraudulent transfers and concealments. It does not expressly exclude property which is exempt under state law. Accordingly, it has been generally held that such exempt assets, including homesteads, are to be considered in determining the question of insolvency for purposes of deciding the validity of liens obtained within the four-month period preceding bankruptcy. See *e.g.*, Laswell v. Stein-Block Co., 93 F.2d 322 (5th Cir.); 1 Collier on Bankruptcy, ¶1.19 at 110-11 (14th ed. 1971) (and cases therein cited); but see In re Armstrong, 145 F. 202, 205 (S.D.Iowa), modified sub nom. Coder v. Arts, 152 F. 943 (8th Cir.) aff'd, 213 U.S. 223.

The rulings of the Bankruptcy Judge and the District Court followed this general rule in holding, with respect to Waddell's application for relief under § 67a, that Waddell's equity in his homestead was to be included in determining his solvency on the date Fleming's judgment was obtained. Waddell does not dispute that the generally accepted view supports rulings. However he urges this court to adopt a construction of § 1(19) in accord with the view expressed in *In re Armstrong*, supra, which would exclude exempt property in determining solvency. Appellant Waddell argues, inter alia, that this is necessary to obtain consistency in concepts and definitions. He says it is illogical that the exempt property be included

to determine solvency here, when neither the trustee nor creditors can reach such property. And he contends that the harmonizing construction suggested is particularly proper since the bankrupt can now invoke § 67 to declare liens void, as well as the trustee.

We cannot agree. The language of § 1(19) is unambiguous. Its intent seems clear. In broad terms it calls for taking into account ". . . the aggregate of [the bankrupt's] property . . .", save only for the limited exclusion for fraudently conveyed or concealed property. Since the statute unambiguously makes only one general exclusion, we feel we should not recognize another, despite the appealing policy argument made. Rather, we must presume, since only the one general exclusion was made, that Congress intended to go only as far as it did. In re Hines, 144 F. 142, 144 (D.Ore.); and see Colorado Public Interest Research Group, et al. v. Train, et al., ____ F.2d ____ (10th Cir., 12/9/74).

As noted above, it was stipulated that if appellant Waddell's equity in his homestead is considered as an asset for the purpose of determining his solvency, his assets were greater than his liabilities on the date when the state court judgment creating the lien in favor of Fleming was rendered. We conclude it was proper to include Waddell's equity in the homestead among his assets for this purpose in connection with the application under § 67a to avoid the judgment lien. Therefore we sustain the finding and conclusion that he was not then insolvent within the meaning of § 67a, and affirm the denial of his application to have the judgment lien declared void.

The case being adequately disposed of on this basis, it is unnecessary for us to consider the question of precisely when Fleming's judgment lien attached for purposes of § 67a.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 8702-B-1

In the Matter of
M. R. WADDELL,
Bankrupt.

MEMORANDUM OF DECISION

(Filed January 30, 1974)

This is an action filed pursuant to 11 U.S.C. §67(c), and Bankruptcy Rules 801 et seq., for review of an order of the Bankruptcy Judge in the above entitled matter. In accordance with his findings of fact and conclusions of law on this issue, the Bankruptcy Judge denied the bankrupt's application under Section 67(a) of the Act, 11 U.S.C. §107(a), to determine a lien on his real property in Douglas County to be null and void. The pertinent facts are not in dispute and there has been a stipulation filed for the purpose of this appeal which narrows the issue to a purely legal question.

Donald E. Fleming, d/b/a Gardner Grain Company of Gardner, Kansas, obtained a judgment in the District Court of Douglas County, Kansas, against M. R. Waddell, the bankrupt herein, on November 22, 1971. On December 21, 1971, Mr. Waddell filed his voluntary petition in bankruptcy. (The stipulation, however, erroneously states the time of the filing of the voluntary petition in bankruptcy to be September 15, 1971, rather than December 21, 1971, as indicated elsewhere in the record.) Under the laws of Kansas, K.S.A. 60-2202, judgments of courts of record are liens on the real estate of the debtor within the county in which the judgment is rendered. Under Section 67(a) of the Bankruptcy Act, a lien against the property of

the bankrupt obtained by judgment within four months before the filing of the bankruptcy petition shall be deemed null and void if the bankrupt was insolvent at the time the lien was obtained. 11 U.S.C. §107(a)(1). Therefore, the only factual issue involved is the solvency of the bankrupt on November 22, 1971.

It has been stipulated that the financial condition of the bankrupt was substantially the same on November 22, 1971, as it was when he filed his voluntary petition in bankruptcy on December 21, 1971. It is further stipulated that if the bankrupt's equity in his farm, which he has claimed as exempt property, is to be considered as an asset for the purpose of determining his solvency at that time, then his assets were greater than his liabilities and he would not be insolvent as defined by the Act. Conversely, if the exempt property is not to be included as an asset to determine the bankrupt's solvency, then the lien on his real property would be nullified since it was obtained within four months of filing the petition and at a time when Mr. Waddell was insolvent.

Insolvency is defined in the Bankruptcy Act as follows:

> "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts;" 11 U.S.C. §1(19).

Whether or not the value of exempt property should be considered in determining the issue of insolvency is one of those rare legal issues upon which there seems to be no dispute. The cases uniformly hold that even though

the property may be exempt under state law, it is still to be considered as an asset in determining the debtor's solvency under the Act. See, e. g., *Lasswell* v. *Stein-Block Co.*, 93 F.2d 322; *Clifton Mercantile Co.* v. *Conway*, 264 S.W. 192; *Webb* v. *First Texas Chemical Mfg. Co.*, 86 S.W.2d 818; and *In re Cohn*, 16 F.Supp. 644, aff'd. 93 F.2d 322.

The reason for the unanimity of the courts is the explicit language of the Act. It excludes expressly certain property of the debtor, and almost by absolute inference it includes exempt property to ascertain the amount of the debtor's assets. *In re Hines*, 144 Fed. 142. In addition, some courts have relied upon the theory that the property is not exempt until the debtor elects to make it exempt, and therefore it should be included in determining his assets since he may use that property to pay his debts if he chooses to do so. *In re Gilmore*, 5 Alaska 293.

In reaching his conclusion, the Bankruptcy Judge quotes at length from 1 Collier on Bankruptcy, 14th Ed. This Court is convinced that that treatise aptly states the well-settled law on the issue at bar. At page 110 of that volume it is said,

> "The definition in question likewise fails to exclude property which is exempt under state law and such assets should therefore be valued in determining the question of the alleged bankrupt's insolvency."

For similar encyclopedic conclusions see 9 Am.Jur.2d, Bankruptcy, §161, and 1 Remington on Bankruptcy §117.

It is the opinion of this Court that the findings and conclusions of the Bankruptcy Judge on this matter are correct, and, for the reasons stated, his order shall be affirmed.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 30th day of January, 1974.

/s/ George Templar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Bankruptcy
No. 8702-B-1

In the Matter of
M. R. WADDELL
Bankrupt

FINDINGS, CONCLUSION AND ORDER

(Filed October 30, 1973)

The above matter comes on for hearing on the Application Under Section 67, filed herein by M. R. Waddell, bankrupt, on January 9, 1973. The applicant appeared in person and by Charles E. Whitman and John M. Cleary, his attorneys; and Donald E. Fleming, d/b/a Gardner Grain Company, appeared by Robert B. Oyler, his attorney.

The matter was continued from time to time, evidence and arguments presented, brief filed, and on October 19, 1973, the matter was taken under advisement.

On this 30th day of October, 1973, the court having examined the pleadings and briefs, heard the evidence and statements of counsel, and being well and fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. Prior to July 22, 1971, Donald E. Fleming, d/b/a Gardner Grain Company of Gardner, Kansas, filed a suit

in the District Court of Douglas County, Kansas, against M. R. Waddell, covering purchases of feed from July, 1969, through December, 1970.

2. On September 15, 1971, bankrupt, M. R. Waddell, married.

3. Prior to the marriage on September 15, 1971, the property occupied by Waddell and described as follows:

> The Northeast quarter of Section 10, Township fifteen (15), Range Twenty-One (21), Douglas County, Kansas

was not a homestead.

4. On November 22, 1971, judgment was obtained by Donald E. Fleming, d/b/a Gardner Grain Company in the total amount of $11,261.63, plus interest, as a result of the litigation referred to in finding No. 1.

5. Execution was issued on the above judgment and the land was to be sold by the sheriff of Douglas County, Kansas, at 1:30 PM, January 11, 1972.

6. M. R. Waddell filed a voluntary petition in bankruptcy on December 21, 1971, and thereafter obtained, through this court, a stay of the execution sale pending in the District Court of Douglas County, Kansas.

7. The bankruptcy schedules filed by M. R. Waddell listed secured creditors totaling $22,000.00 priority claims in the amount of $400.00, and unsecured creditors in the amount of $13,584.33. The latter sum included the $11,261.63 judgment of Donald E. Fleming, d/b/a Gardner Grain Company. The schedules listed assets consisting of real estate in which bankrupt's interest was estimated at $100,000.00, the real estate being that hereinbefore described. In addition, bankrupt listed some items of per-

sonal property, including his automobile and household goods valued at $1,180.00. For exemptions, bankrupt claimed the above described 160 acres of land valued at $100,000.00, the automobile listed as having no value, household goods, assets and items of personal use valued at $200.00, for a total claimed exemptions of $100,200.00.

8. In the summary of debts and assets in bankrupt's schedules, total debts listed were $35,984.33, total assets listed as $101,211.58. The exemptions claimed as shown on the summary sheet were $101,211.58 (the total of his property); however, in schedule B-5, where exemptions are claimed, the total value claimed was $100,200.00.

9. The bankrupt, M. R. Waddell, was not insolvent within the meaning of the Bankruptcy Act when the judgment lien of Donald E. Fleming, d/b/a Gardner Grain Company, was obtained or at any time within the four months period preceding the filing of his petition in bankruptcy on December 21, 1971.

10. Following a contested hearing, on December 1, 1972, the real estate above described was found to qualify as a homestead and was exempt property on December 21, 1971, the date of filing the petition in bankruptcy. The real estate was set off as exempt together with other items on December 8, 1972.

11. On January 9, 1973, bankrupt filed an application under § 67a of the Bankruptcy Act, 11 USC § 107a, seeking to have the lien of the judgment in favor of Donald E. Fleming, d/b/a Gardner Grain Company declared null and void on the ground the judgment lien in question was obtained within four months before the filing of the petition in bankruptcy on December 21, 1971, and that bankrupt, M. R. Waddell, was insolvent as defined in § 1(19) of the Bankruptcy Act, 11 USC § 1, when the judgment lien was

obtained by Donald E. Fleming, d/b/a Gardner Grain Company, on November 22, 1971.

QUESTIONS INVOLVED

1: May § 67a of the Bankruptcy Act, 11 USC § 107a, be invoked in behalf of the bankrupt, or does it exist for the sole benefit of the trustee who seeks to bring assets into the bankrupt estate?

2. Was the judgment lien of Donald E. Fleming, d/b/a Gardner Grain Company, obtained within four months before the filing of a petition initiating a proceeding under the Bankruptcy Act?

3. Was the bankrupt insolvent at the time the judgment lien was obtained?

CONCLUSIONS

The parties have invoked the summary jurisdiction of the court granted by § 67b, 11 USC § 107b, to determine voidability of a judgment lien.

The bankrupt, Waddell, seeks benefit of § 67a of the Bankruptcy Act, 11 USC § 107a, to declare void a judgment lien obtained by Donald E. Fleming, d/b/a Gardner Grain Company, in the District Court of Douglas County, Kansas.

The usual situation encountered in actions of this nature involve the trustee of a bankrupt estate seeking to utilize the provisions of § 67a to bring property within the estate for the benefit of general creditors, free of a lien obtained by judicial process within four months of bankruptcy.

Prior to the amendment of § 67a in 1938, it was only the trustee who could bring the proceeding to void the lien. It is now clear the bankrupt may bring the action to

have his exempt property cleared of voidable liens. See 1 Collier on Bankruptcy, 14th Ed., at 169. The evidence in this case does not disclose when the action was filed in the District Court of Douglas County, Kansas. However, the judgment was rendered November 22, 1971, and the clerk instructed to enter the judgment on the appearance docket forthwith.

K.S.A. 60-2202 provides that judgments of Courts of Record of this State shall be liens on the real estate of the debtor within the county in which the judgment was rendered, the lien to be effective from the time at which the petition stating the claim against the judgment debtor was filed, but not to exceed four months prior to the entry of the judgment.

Under a literal interpretation of the above statute, the lien in question would be effective July 22, 1971, four months prior to the entry of the judgment on November 22, 1971, and five months prior to the filing of the petition in bankruptcy on December 21, 1971. Bankrupt contends there was no lien on July 22, 1971, that the judgment lien was obtained on November 22, 1971, when the judgment was rendered and consequently within four months of filing the petition in bankruptcy.

The Bankruptcy Act in § 67a, 11 USC § 107a, provides in pertinent part, as follows:

> "§ 67. Liens and Fraudulent Transfers. a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or . . . ."

The purpose of the foregoing section of the Bankruptcy Act is stated in 4 Collier on Bankruptcy, 14th Ed., at 65:

> "Section 67a asserts the principle that,
>
> "'as between creditors, "equality is equity," and that the race of diligence must cease, with respect to legal proceedings against a person who is insolvent, at the commencement of four months preceding the filing of the petition. This conclusion does not prevent the honest debtor seeking to work out from embarrassments from receiving present aid to that end, and from giving proper security other than that obtained through legal proceedings against an insolvent.'" [Footnotes omitted.]

The elements necessary to declare a judgment lien null and void under § 67a are set forth in 4 Collier on Bankruptcy, 14th Ed., at 66. They are:

> "A lien obtained in or pursuant to judicial proceedings, to be voidable at the suit of the trustee or the debtor, as the case may be, must, however, satisfy certain conditions: (1) it must attach to property of the bankrupt which passes to the trustee under § 70a or is exempt under § 6; (2) it must have been acquired within four months prior to the initiation of the bankruptcy proceedings; and (3) it must either have attached during the insolvency of the bankrupt, or it must have been sought and permitted in fraud of the provisions of the Act. Where these statutory requirements are not met, the holder of the lien must be allowed to retain the benefits of his lien." [Footnotes omitted.]

One of the indispensable ingredients of a successful effort to declare a judgment lien null and void under § 67a, is that the party suffering the lien be insolvent at the time the lien attaches.

The party seeking to void the lien has the burden of proof. See 4 Collier on Bankruptcy, 14th Ed., at 98, where we find the following:

> "Not only must every judicial lien be obtained within four months of the filing of the petition, to be invalid under § 67a, but one of two further conditions must concur under the terms of § 67a(1): (a) it must have been obtained while the debtor was insolvent; or (b) it must have been sought and permitted in fraud of the provisions of the Bankruptcy Act. Insolvency as of the time the lien attaches is essential under the first alternative.
>
> "An adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him, for no presumption arises from the adjudication that he was insolvent for any period before the petition was filed, unless the fact of insolvency at the time the lien was obtained was necessarily decided by the adjudication, and then it is binding only on the parties to the adjudication proceeding or privies thereto. The burden is on him who seeks to avoid a lien to plead and prove the insolvency of the debtor at the time the lien was secured. Whether the debtor was then insolvent, is, of course, normally a question of fact." [Footnotes omitted.]

It is readily apparent from the foregoing findings that bankrupt's assets as shown by the evidence, including the sworn schedules, show the aggregate of his property exceeds his debts by approximately $65,000.00.

However, it is the contention of bankrupt in determining the issue of insolvency that one must first deduct from the aggregate of bankrupt's property all of his exemptions. The exemptions here have a value of approxi-

mately $100,000.00, and if they were first deducted from the aggregate of bankrupt's property, the remaining property, at a fair valuation, would not be sufficient in amount to pay bankrupt's debts.

The Bankruptcy Act in § 1(19), 11 USC § 1(19) defines in specific terms when a person shall be deemed insolvent. The provision is:

> "(19) A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

The only property excluded in making the computation is "exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors."

Exclusion of exempt property from the definition is conspicuously absent.

An enlightening discussion of the failure to exclude exempt property from the definition of insolvency is found in 1 Collier on Bankruptcy, 14th Ed., at 110. It is as follows:

> "The definition in question likewise fails to exclude property which is exempt under state law and such assets should therefore be valued in determining the question of the alleged bankrupt's insolvency. This rule was first announced in the early case of *In re Baumann* and, not long thereafter, reiterated in the case of *In re Hines*. In the latter decision the court stated:

" 'The language of the Act is very plain, without ambiguity or double meaning, and, when it is found that one exception is expressly made, it excludes, by almost absolute inference, a deduction that another was also intended, so that, upon a simple construction of the Act, it is manifest that it was not the purpose or intendment of the lawgiver that exempt property should be deducted in ascertaining the amount of the debtor's property at a fair valuation.'

"The holding of the two decisions mentioned has been accepted and followed by a substantial number of cases. There have been, however, repeated efforts to effect a change in the act in this respect. The Ray amendatory bill of 1903 sought to insert words which would have excluded exempt property from the aggregate of a debtor's assets in determining whether he was insolvent, but the Senate struck out the provision. Prior to the passage of the Chandler Act of 1938, there were renewed attempts by the American Bar Association committee and others to exclude such property under the definition as retained by the new Act.

"These efforts, however, were unavailing and the old definition was adopted without change. Even assuming that it was advisable to retain the general theory behind the bankruptcy definition of insolvency, there is considerable force in the arguments for the omission of exempt property from the balance sheet test in determining insolvency. And it should be noted that while exempt property is not excluded under the definition of clause (19), *supra*, it must be disregarded in determining solvency under § 67d, which deals with the setting aside of fraudulent transfers." [Footnotes omitted.]

In *Lasswell v. Stein-Block Co. et al In re Cohn*, 93 F.2d 322, at 323, the matter was disposed of as follows:

> "The language of section 1(15) of the Bankruptcy Act is explicit and unambiguous, leaving no room for construction. But one exception is made as to the property to be reckoned in computing insolvency, and that is property conveyed or concealed or permitted to be conveyed or concealed, with intent to hinder, defraud, or delay creditors. The courts have consistently declined to broaden the exclusion. Conceding the nature of a community homestead in Texas and the husband's lack of power to alienate it without the consent of his wife, as held in the Texas cases above cited, we hold that such exempt homestead should be included in computing solvency, since there is no indication of congressional intent to exclude any property other than that conveyed or concealed to hinder or delay creditors. We are not concerned with the rationale of the act. Its terms are plain; judicial interpretation should conform."

In the many revisions of the Bankruptcy Act which have occurred since the *Lasswell* decision, including the Chandler Act, the definition of insolvency has not been changed to embrace the exclusion of exempt property contended for here.

From the foregoing, it is clear the bankrupt has failed to sustain the burden of proving he was insolvent at any time within the four months period preceding the filing of this voluntary bankruptcy proceeding. Since the indispensable element to voidability of a lien under § 67a is lacking, it is unnecessary to decide whether the lien in question was obtained on July 22, 1971, under K.S.A. 60-2202 or within four months of bankruptcy on November 22, 1971, when the judgment was rendered.

ORDER

Pursuant to the foregoings findings and conclusions, it is

ORDERED, the Application Under Section 67, filed herein by M. R. Waddell, on January 9, 1973, be and the same is hereby denied.

Dated this 30th day of October, 1973.

/s/ J. M. Sullivant
Bankruptcy Judge

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a copy of the foregoing instrument was mailed at Kansas City, Kansas, on October 30, 1973, addressed to the following:

Mr. John M. Cleary
Attorney at Law
1210 Commerce Tower
Kansas City, Missouri 64105

Mr. Charles Whitman
Attorney at Law
905 Tennessee
Lawrence, Kansas 66044
(Attorneys for bankrupt)

Mr. Robert B. Oyler
Attorney at Law
700 Massachusetts Street
Lawrence, Kansas 66044
(Attorney for Donald E. Fleming)

/s/ Rosemary Dragastin
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Bankruptcy
No. 8702-B-1

IN THE MATTER OF
M. R. WADDELL
Bankrupt

APPLICATION UNDER SECTION 67

(Filed January 9, 1973)

The application of M. R. Waddell, bankrupt, respectfully represents:

1. Your applicant is the bankrupt in the estate above named.

2. On November 22, 1971, and within four months before the filing of a petition in bankruptcy herein by M. R. Waddell, the above named bankrupt, Donald E. Fleming, d/b/a Gardner Grain Company, obtained a judgment in the sum of $11,261.63, with interest, docketed December 3, 1971, in the office of the Clerk of the District Court of Douglas County, Kansas, and a lien against real property of the bankrupt located in Palmyra Township, Douglas County, Kansas, to wit:

> The Northeast quarter of Section 10, Township Fifteen (15), Range Twenty-One (21), Douglas County, Kansas;

3. On November 22, 1971, at the time when such judgment was entered and on December 3, 1971, when such judgment was docketed and such lien obtained, the above named M. R. Waddell was insolvent as defined in Section 1 (19) of the Bankruptcy Act.

4. On said November 22 and December 3, 1971, said M. R. Waddell, bankrupt, had a homestead in such farm above described.

WHEREFORE, your applicant prays that this court determine that said lien is null and void, and discharge said property from such lien; and that your applicant have such other and further relief as is just.

M. R. Waddell
By /s/ Charles E. Whitman
Post Office Box One
Lawrence, Kansas 66044
and
By /s/ John M. Cleary
1210 Commerce Tower
Kansas City, Missouri 64105
474-8850
Attorneys for Bankrupt

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Subscribed and sworn to by the said JOHN M. CLEARY this 5th day of January, 1973.

Mary Raye Barnett
Notary Public

My Commission Expires: January 9, 1973.

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of the within Application under Section 67, this 5th day of January, 1973, addressed to the following:

Oyler & Paddock
Attorneys at Law
Kansas Power & Light Building
700 Massachusetts Street
Lawrence, Kansas 66044
(Attorneys for Donald E. Fleming)

Donald E. Fleming
d/b/a Gardner Grain Company
Gardner, Kansas 66030

Mr. Dan E. Turner
Attorney at Law
400 Columbian Building
Topeka, Kansas 66603

/s/ John M. Cleary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Bankruptcy No. 8702-B-1

In the Matter of
M. R. WADDELL,
Bankrupt.

STIPULATION

(Filed November 29, 1973)

IT IS HEREBY STIPULATED by and between M. R. Waddell, appellant, through his attorney, John M. Cleary, and Donald B. Fleming d/b/a Gardner Grain Company, respondent, through his attorney, Robert B. Oyler, for the purpose of the appeal to the United States District Court taken by appellant on November 29, 1973, as follows:

1. That the financial condition of the appellant was substantially the same on November 22, 1971, the date of the judgment in the District Court of Douglas County, Kansas, as it was at the time of the filing of the voluntary petition in bankruptcy on September 15, 1971.

2. That on both said occasions, bankrupt claimed a homestead in his farm in Douglas County; that for the purposes of this appeal the value of said farm was $100,000.00 on both said dates, and that the encumbrances on said land (the first and second mortgages) were less than $25,000.00 on both said dates.

3. That if the bankrupt's equity in said farm is considered as an asset for the purpose of insolvency, that the assets of the bankrupt were greater than his liabilities on said November 22, 1971; but if exempt property, including said homestead, cannot be considered to determine

insolvency, the assets of the bankrupt were less than his liabilities on November 22, 1971.

The above facts are hereby stipulated by the parties hereto for the purpose of the appeal of M. R. Waddell, Bankrupt, taken November 29, 1973.

M. R. Waddell, Appellant
By /s/ John M. Cleary
1210 Commerce Tower
Kansas City, Missouri 64105
474-8850
His Attorney

Donald B. Fleming
d/b/a Gardner Grain Company,
Respondent
By /s/ Robert B. Oyler
700 Massachusetts Street
Lawrence, Kansas 66044
His Attorney